

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHARLES R. ROBINSON, IV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a motion to correct or vacate a sentence filed under 28 U.S.C. § 2255 is timely when filed within one year of this Court's denial of rehearing of an order denying a petition for certiorari to review the underlying conviction and sentence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles R. Robinson, IV ("Robinson"), respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") affirming the District Court's dismissal of Petitioner's motion to correct or vacate his federal sentence (the "Motion"), pursuant to 28 U.S.C. § 2255 ("Section 2255") as untimely. In affirming, the Seventh Circuit found the Motion untimely, even though Robinson filed it within one year of this Court's denial of his petition for rehearing the order denying his initial petition for certiorari in his underlying criminal case, based on the conclusion that the one-year statute of limitations in Section 2255 runs from the date a petition for certiorari is denied and is not tolled by a rehearing petition.

OPINIONS BELOW

The opinion of the Seventh Circuit (Pet. App. 1-11) is reported at 416 F.3d 645. The opinion of the United States District Court for the Central District of Illinois (the "District Court") (Pet. App. 12-15) is reported at 288 F. Supp. 2d 927.

JURISDICTION

The order of the Seventh Circuit was entered on July 29, 2005. There were no petitions for rehearing. On October 17, 2005 Justice Stevens extended the time for filing

this petition to and including December 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 2255 provides, in pertinent part:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

2. *Supreme Court Rule 16* provides, in pertinent part:

Rule 16. Disposition of a Petition for a Writ of Certiorari

3. Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

3. *Supreme Court Rule 44* provides, in pertinent part:

Rule 44. Rehearing

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). The certificate shall be bound with each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument.

STATEMENT OF THE CASE

This case presents a narrow but important and recurring question relating to the timeliness of motions filed pursuant to Section 2255. On March 14, 2003, Robinson filed with the District Court his Motion under Section 2255 to vacate, set aside, or correct his federal criminal sentence. The District Court had jurisdiction over Robinson's Motion pursuant to 28 U.S.C. § 1331. On October 27, 2003, the District Court denied Robinson's Motion, concluding that it was untimely and filed outside the one-year statute of limitations period set forth in Section 2255. The District Court raised the question of the timeliness of Robinson's Motion *sua sponte* and held that Robinson's conviction became final under Section 2255 on the date that this Court initially denied Robinson's petition for a writ of certiorari, October 1, 2001 (the "Initial Certiorari Denial"), even though Robinson filed a petition for rehearing that this Court did not deny until March 18, 2002 (the "Rehearing Denial"). The District Court determined that the filing of the petition for rehearing did not toll the finality of the conviction. Therefore, even though Robinson filed his Motion within one year of the Rehearing Denial, the District Court found it untimely because it was filed more than one year after the Initial Certiorari Denial and entered judgment confirming Robinson's conviction and sentence. The District Court did not reach the merits of Robinson's Motion.

On November 7, 2003, Robinson timely moved the District Court to alter or amend its judgment. The District Court denied that motion on December 17, 2003. Robinson then noticed his appeal to the Seventh Circuit and moved for a certificate of appealability. The District Court denied Robinson's motion for a certificate of appealability. He

then moved the Seventh Circuit for a certificate of appealability, which the Seventh Circuit granted.

On appeal to the Seventh Circuit, Robinson argued that his Motion was timely filed within Section 2255's one-year statute of limitations because he filed it within one year of this Court's Rehearing Denial. The Seventh Circuit rejected Robinson's argument, affirming the District Court's dismissal of the Motion as untimely in a decision dated July 29, 2005.

The Seventh Circuit noted that Section 2255 does not define finality. (Pet. App. 4). It further noted that this Court had not directly addressed the effect of a rehearing procedure on the finality of a conviction for purposes of Section 2255. (Pet. App. 4). However, the Seventh Circuit looked to *Clay v. United States*, 537 U.S. 522 (2003), which did not involve a rehearing petition, and Sup. Ct. R. 16.3 ("Rule 16.3"), which is a non-substantive notification rule, to conclude, in error, that Robinson's conviction was "final" for purposes of Section 2255's one-year statute of limitations when this Court initially denied his petition for certiorari on direct review, even though Robinson had timely filed a petition for rehearing of that denial. This conclusion is inconsistent with decisions of this Court, which hold that the denial of a petition for certiorari is qualified until the time for petitioning for rehearing expires. See *R. Simpson & Co. v. Comm'r of Internal Revenue*, 321 U.S. 225 (1944); *Flynn v. United States*, 75 S. Ct. 285 (1955). As other circuits have found, the logic of these decisions is that, once a petition for rehearing a denial of certiorari is filed, the initial denial of certiorari remains qualified until this Court has disposed of the petition for rehearing, which then becomes the final action of this Court. *E.g.*, *Blair v. Armontrout*, 994 F.2d 532, 533

(8th Cir. 1993). Thus, a petition for certiorari is not finally denied until the Court resolves any outstanding petition for rehearing. The Seventh Circuit's decision conflicts with this binding Supreme Court precedent insofar as it concluded that Robinson's conviction was final when this Court initially denied certiorari on direct review despite Robinson's timely-filed petition for rehearing.

Robinson now petitions this Court for a writ of certiorari to review and correct the decision of the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Seventh Circuit Is Inconsistent With Applicable Decisions Of This Court

The Seventh Circuit's decision that, for purposes of Section 2255's limitations period, a conviction is final upon this Court's denial of certiorari on direct review despite the filing of a petition for rehearing of that denial, is inconsistent with governing precedent of this Court, which holds that such a denial is qualified (and therefore not "final") during the time to petition for rehearing. *Simpson*, 321 U.S. at 229-230; *Flynn*, 75 S. Ct. at 286.

On March 14, 2003, Robinson filed his Motion under Section 2255 to vacate or correct his sentence. Section 2255 contains several triggers that start the running of the statute of limitations for such motions. At issue here is the first:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction becomes final

28 U.S.C. § 2255 ¶ 6(1). Since Section 2255 does not define "final," this Court has been called upon to do so. See *Clay*, 537 U.S. at 527. In *Clay*, the Court held that a conviction becomes "final" "when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Id.* (citing *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) and *Caspari v. Bohlen*, 510 U.S. 383, 953 (1994)). Thus finality attaches under Section 2255 when the Court "denies a petition for a writ of certiorari." *Id.* See also *Griffith*, 479 U.S. at 321 n.6; *Caspari*, 510 U.S. at 953. No petition for rehearing had been filed in *Clay*, so the Court had no reason to consider, and did not consider the effect such a petition would have on its definition of finality. By contrast, here, where Robinson did file a petition for rehearing, the question becomes what impact such a filing has on *Clay*'s definition of finality.

This Court answered this question in *R. Simpson & Co. v. Commissioner of Internal Revenue*. 321 U.S. at 229. In *Simpson*, this Court considered the interplay between a denial of certiorari and the Court's rules governing petitions for rehearing from such denials. There, the petitioner sought a writ of certiorari to review a decision of the Board of Tax Appeals (now Tax Court), which this Court denied. *Id.* at 227. Petitioner allowed the time to petition for rehearing to expire, but, after the Ninth Circuit subsequently issued a favorable decision, the petitioner requested leave from this Court to file an out-of-time petition for rehearing. *Id.* This Court granted the petition provisionally to determine whether, in light of the finality

provisions in 26 U.S.C. § 1140 ("Section 1140"), it had jurisdiction to hear the case. *Id.*

Section 1140 provided that a board decision became "final" when one of three events occurred, including, relevant here, when a petition for certiorari was denied:

Date when board decision becomes final

* * *

(b)(2) Petition for certiorari denied

Upon the *denial of a petition for certiorari*, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals;

* * *

26 U.S.C. § 1140(b)(2) (1939) (emphasis added). The language of "finality" under Section 1140 is nearly identical to the language of finality set forth in *Clay* – both referring to when a petition for certiorari is denied. Just as the statute lists a denial of certiorari as a "final" event, so too does *Clay*. Compare *Clay*, 537 U.S. at 527 with I.R.C. § 1140 (26 U.S.C. § 1140(b)(2) (1939)).¹

In the rehearing context, this Court in *Simpson* interpreted Section 1140's "denial of a petition for certiorari" finality trigger and held that under Sup. Ct. R. 34 (now Rule 16.3), until the time to petition for rehearing expired, the denial of certiorari must be viewed as "qualified." 321 U.S. at 229. The Court reasoned that qualifying "finality" until the expiration of the period for petitioning

¹ Now I.R.C. § 7481 (26 U.S.C. § 7481). I.R.C. § 7481 is almost a mirror image of its predecessor.

for rehearing permitted the Court to indulge in the benefit of additional argument and examination of a particular legal issue. *Id.* Thus, asked to define "finality" in the denial-of-certiorari context, this Court in *Simpson* concluded that where a party did not file a petition for rehearing within the 25-day time period, the denial of certiorari remains qualified until that period expires.

Justice Frankfurter reaffirmed that interpretation of the Court's rules in *Flynn v. United States*, 75 S. Ct. 285 (1955). There, after the Court denied a petition for certiorari, the petitioners sought rehearing. Invoking then-Supreme Court Rule 25 (now Rule 16.3), the petitioners also moved for suspension of the order denying certiorari. *Id.* Justice Frankfurter, in granting the motion, reiterated that under Supreme Court rules, a "denial of a petition for certiorari *should not be treated as a definitive determination in this Court.*" 75 S. Ct. at 286 (emphasis added). Even though the Court denies such petitions as a matter of course, "[t]he right to such a consideration is not to be deemed an empty formality. . . ." *Id.*

The logic of both *Simpson* and *Flynn* is that, when a petition for rehearing is filed, the denial of certiorari remains qualified until this Court acts on that petition. *Cf. United States v. Healy*, 376 U.S. 75, 78 (1964) ("This summary disposition plainly reflects an advertent decision that criminal judgments are nonfinal for purposes of appeal so long as timely rehearing petitions are pending.") Action on a rehearing petition would then become the "final" action taken by the Court. *See, e.g., Blair*, 994 F.2d at 533 ("If a motion for rehearing is filed with the Supreme Court, final action of the Supreme Court will be the denial of that motion, or if the motion is granted, then, as the Supreme Court shall order."). Thus, only after the Court

acts on the petition for rehearing would the denial of certiorari be transformed from qualified to final, thereby rendering an underlying conviction final for purposes of Section 2255. Only then would Section 2255's one-year statute of limitations begin to run.

The Seventh Circuit's decision conflicts with *Simpson* and *Flynn* in holding that Robinson's conviction was final under Section 2255 on the date that his petition for certiorari was initially denied. Under *Simpson* and *Flynn*, that denial was qualified until Robinson's time for rehearing expired. Because Robinson timely filed a petition for rehearing, this Court's denial of certiorari remained qualified until this Court acted on that petition. The Court should grant certiorari to address the Seventh Circuit's noncompliance with this Court's decisions in *Simpson* and *Flynn*.

II. The Seventh Circuit's Improper Reliance On Rule 16.3 Creates An Inconsistency In This Court's Rules That The Court Should Clarify

The Seventh Circuit brushed aside this Court's holding in *Simpson*, citing Sup. Ct. R. 16.3. The Seventh Circuit reasoned that because under Rule 16.3 "the filing of a petition for rehearing a denial of certiorari has no effect, absent a specific order of the Court or a Justice thereof," the filing of a petition for rehearing would have no effect on Section 2255's statute of limitations. (Pet. App. 6) However, this interpretation of Rule 16.3 misperceives the history of the rule and creates an improper inconsistency with Sup. Ct. R. 44.2 ("Rule 44.2").

A. The Seventh Circuit's Reliance On Rule 16.3 Was Improper Because Rule 16.3 Is A Notification Rule, Not A Substantive Rule

In *Clay*, this Court looked to its own precedent in fashioning its interpretation of finality under Section 2255 and not to Rule 16.3. This was appropriate because Rule 16.3 is a notification rule, the purpose of which is to alert counsel that the 25-day period for petitioning for rehearing under Rule 44.2 has commenced. See *Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1508 (1st Cir. 1989) ("Rule 23.3 [now 16.3], upon which Hanover relies, is merely a notification provision, without substantive effect.")²

Contrary to what the Seventh Circuit concluded (Pet. App. 8), Rule 16.3 has not materially changed since *Simpson* was decided. *Id.* at 1508 n.5. Although Rule 16.3 has undergone minor revisions, it has remained substantively the same since its adoption in 1939. In 1939, the pertinent language that eventually became Sup. Ct. R. 16.3 was adopted as follows:

No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, *and shall forthwith notify* the court below and counsel of record.

Sup. Ct. R. 34, 306 U.S. 671, 713-14 (1939) (emphasis added). That was the relevant text when *Simpson* held

² Despite the Seventh Circuit's assertion that its holding is consistent with every other circuit that has considered this issue (Pet. App. 10), it is clear from *Hanover* that the Circuits do not agree whether substantive effect should be given to Rule 16.3.

that an order denying certiorari was "qualified" until the petition for rehearing (if one were timely filed) was decided.

The rule was similar in 1954, a year before *Flynn* reaffirmed *Simpson's* interpretation of Supreme Court procedure:

No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, *and shall forthwith notify* the court below and counsel of record. Such *notification* will not be withheld pending disposition of a petition for rehearing except by order of the court of a justice thereof.

Sup. Ct. R. 25.2, 346 U.S. 949, 975 (1954) (emphasis added). In *Flynn*, the petition for certiorari was denied on January 10, 1955, and Justice Frankfurter issued his suspension order on January 12, with the proviso that notification of the denial would be issued on January 17 unless the petitioners provided a substantial showing that rehearing should be granted. *Id.* Justice Frankfurter reasoned that there was no justification for withholding *notification* because the time provided by his order would allow petitioners to marshal an argument supporting rehearing. *Id.* As Justice Frankfurter's opinion demonstrates, then-Rule 25 did not dictate when the Supreme Court's decision was final, but rather when the period for filing a petition for rehearing commenced.

Later, at the time of the *Hanover* decision, Rule 16.3 remained a notification rule, then identified as Sup. Ct. R. 23.3:

Whenever a petition for a writ of certiorari to review a decision of any court is denied, an order to that effect will be entered and the Clerk forthwith will *notify* the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.

Sup. Ct. R. 23.3, 445 U.S. 985, 1012 (1980) (emphasis added). In 1990 and 1995, the rule underwent minor alterations and was renumbered as Sup. Ct. R. 16.3. In 1990 it read:

Whenever a petition for a writ of certiorari to review a decision of any court is denied, the Clerk shall enter an order to that effect and *shall forthwith notify* the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

Sup. Ct. R. 16.3, 493 U.S. 1099, 1116 (1990) (emphasis added). It is fundamentally the same today, *see* Sup. Ct. R. 16.3, and there is no indication that any of the changes that Rule 16.3 has undergone over the years had any impact on the rule or its effect that would alter *Simpson's* characterization of a denial of certiorari as a "qualified" decision. *See Hanover*, 880 F.2d at 1508 n.5.

Simply put, Rule 16.3 provides for notification to the court below and counsel of record that the period for filing a petition for rehearing has commenced. *Id.* at 1508. The qualification period comprises a limited reprieve, deferring finality until the time for petitioning for rehearing expires, *id.*, or if a petition for rehearing is filed, as it was here, until that petition is finally decided. *Healy*, 376 U.S. at 78. By contrast, suspension of an order denying certiorari

implies a delay of the entire decision for all purposes. *Hanover*, 880 F.2d at 1508, citing *Richmond v. Arizona*, 434 U.S. 1323, 1325 (1977).

B. The Seventh Circuit's Interpretation Of Rule 16.3 Creates An Improper Inconsistency With Rule 44.2

By inappropriately according substantive weight to Rule 16.3 and holding that the filing of a petition for rehearing from the denial of certiorari has no effect on the date of finality of that denial, the Seventh Circuit has created an inconsistency with Rule 44.2. Rule 44.2 provides:

Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial. . . . The petition shall be presented with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and *not for delay*;

Sup. Ct. R. 44.2 (emphasis added).

If the Seventh Circuit's interpretation of Rule 16.3 is correct, then the language in Rule 44.2 requiring certification from counsel that a petition for rehearing of a denial of certiorari is not presented "for delay" is nonsensical. Under the Seventh Circuit's reading of Rule 16.3, it would be impossible for the petition for rehearing to have any delaying effect because, in the Seventh Circuit's view, a petition for rehearing does nothing to qualify or otherwise

alter the finality it attributes to the Court's denial of certiorari.

This Court must be the final arbiter of what its own rules mean and should not permit a decision of a court of appeals to create an inconsistency as to the application of these rules. To ensure clarity in the application of the Rules of this Court, the Court should grant certiorari to review the Seventh Circuit's decision.

III. The Issue Presented By This Case Is A Recurring Question Of Great Importance

This case presents an issue that affects literally thousands of prisoners seeking to vindicate their constitutional rights through collateral review. In the twelve months ended March 31, 2004, more than 28,000 state and federal prisoners petitioned for relief in United States district courts. See Table C-2, U.S. District Courts – Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, at <http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf>. The sheer number of people affected by the Seventh Circuit's decision represents a compelling reason for this Court to exercise its jurisdiction to review the Seventh Circuit's decision. See, e.g., *Patterson v. Lamb*, 329 U.S. 539, 541 (1947).

The Seventh Circuit's error in its application of this Court's precedent is amplified not only by the large number of people that it affects but also by the gravity of its context – habeas review – which is the last opportunity for prisoners to vindicate their constitutional rights. The importance of the Great Writ cannot be overstated. "This Court has constantly emphasized the fundamental importance of the writ of

habeas corpus in our constitutional scheme. . . ." *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

Federal courts, and especially this Court, have a primary obligation to protect individuals' constitutional rights. *Harris v. Reed*, 489 U.S. 255, 267 (1989) (Stevens, J. concurring) ("[T]he federal courts – and particularly this Court – have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution."). Regarding the writ of habeas corpus, "[t]he Court has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'" *Johnson*, 393 U.S. at 485 (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)). Thus, "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.*

The Seventh Circuit's decision, however, throws up one more unwarranted and improper obstruction on a habeas path already fraught with such obstructions. In doing so, the Seventh Circuit fails to give any policy rationale for a decision that further restricts prisoners' access to the federal courts. In a matter of such overwhelming importance, which this Court has never specifically considered, this Court should grant certiorari to correct the Seventh Circuit's error.

CONCLUSION

Because the Seventh Circuit's decision is plainly inconsistent with governing precedent of this Court, misapplies this Court's rules, and addresses an issue of singular importance, this petition for a writ of certiorari should be granted and set down for briefing and argument

on the merits. Alternatively, this Court should grant this petition, summarily reverse the decision of the court of appeals, and remand for further consideration in light of this Court's decisions in *R. Simpson & Co. v. Comm'r of Internal Revenue*, 321 U.S. 225 (1944), and *Flynn v. United States*, 75 S. Ct. 285 (1955).

Respectfully submitted,

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App. 1

416 F.3d 645

United States Court of Appeals,
Seventh Circuit.

Charles R. ROBINSON, IV, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 04-1223.

Argued April 7, 2005.

Decided July 29, 2005.

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Foley & Lardner, Milwaukee, WI, for Petitioner-Appellant.

Gregory M. Gilmore (argued), Office of the United
States Attorney, Springfield, IL, for Respondent-Appellee.

Before MANION, ROVNER, and SYKES, Circuit
Judges.

SYKES, Circuit Judge.

This appeal presents the question of when a federal conviction "becomes final" for purposes of the one-year limitations period for pursuing collateral relief under 28 U.S.C. § 2255, ¶ 6(1). The government argues that finality attaches to a judgment of conviction when the Supreme Court affirms on the merits on direct review or denies a petition for a writ of certiorari, or the time for filing a certiorari petition expires. Petitioner Charles Robinson argues that a judgment of conviction does not become final until the Supreme Court denies a petition for rehearing a denial of certiorari, or the time for filing such a petition expires.

The government is correct. Pursuant to *Clay v. United States*, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003), *Horton v. United States*, 244 F.3d 546, 551 (7th

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Cir.2001), and *United States v. Marcello*, 212 F.3d 1005, 1008 (7th Cir.2000), finality attaches for purposes of the one-year limitations period of § 2255, ¶ 6(1) when the Supreme Court affirms on the merits on direct review or denies certiorari, or the time for filing a certiorari petition expires, not the later date when the Court denies a petition for rehearing a denial of certiorari or the time for filing such a petition expires. Because Charles Robinson filed his § 2255 motion more than one year after the Supreme Court denied his petition for certiorari, the district court properly dismissed it as untimely.

I. Background

This is the fourth time Robinson's case has come before this court. Robinson was convicted in December 1997 of three felonies: possession of cocaine with intent to distribute, possession of cocaine base with intent to distribute, and simple possession of cocaine base. Given Robinson's extensive criminal history, the imposition of a number of enhancements under the Sentencing Guidelines, and the district court's finding that Robinson was responsible for more than 500 grams of crack, he was sentenced to a term of 100 years in prison. This court affirmed his convictions on direct appeal but remanded for resentencing, having concluded that the evidence of drug quantity was unreliable. *United States v. Robinson*, 164 F.3d 1068 (7th Cir.1999). On remand the district court held a new sentencing hearing at which several witnesses testified to the drug quantity issue. Concluding once again that Robinson was responsible for more than 500 grams of crack, the judge reimposed the 100-year sentence. *United States v. Robinson*, 76 F.Supp.2d 941 (C.D.Ill.1999). Finding no clear error in the district court's reliance on the

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new evidence, this court affirmed in an unpublished order. *United States v. Robinson*, No. 99-4071, 215 F.3d 1331, 2000 WL 689182 (7th Cir. May 23, 2000).

The Supreme Court later granted Robinson's petition for certiorari and summarily reversed and remanded for reconsideration in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Robinson v. United States*, 531 U.S. 1005, 121 S.Ct. 559, 148 L.Ed.2d 479 (2000). On remand we held that Robinson's argument failed the fourth prong of plain-error review and affirmed the sentence. *United States v. Robinson*, 250 F.3d 527 (7th Cir.2001). Robinson again petitioned for a writ of certiorari, which the Supreme Court denied on October 1, 2001. He petitioned for rehearing, but that, too, was denied on March 18, 2002.

On March 14, 2003, Robinson filed for postconviction relief pursuant to § 2255, asserting ineffective assistance of counsel and *Apprendi* arguments. The district court concluded the motion was not timely filed, relying on this court's decision in *Marcello*, 212 F.3d at 1008, which held that a conviction becomes final for purposes of the one-year limitations period in § 2255 when the defendant's petition for certiorari is denied. Because Robinson filed his § 2255 motion more than one year after the Supreme Court denied his petition for certiorari, the district court denied it as untimely. This court issued a certificate of appealability limited to the ineffective assistance of counsel issue and ordered counsel appointed. The order also requested briefing on the limitations issue that the district court found dispositive.

II. Discussion

Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA"), a motion pursuant to § 2255 must be filed within one year of four possible dates, one of which is relevant to this case: the "date on which the judgment of conviction becomes final." 28 U.S.C. § 2255, ¶ 6(1). The statute does not define finality. However, the Supreme Court has held that in the context of postconviction relief, finality attaches when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay*, 537 U.S. at 527, 123 S.Ct. 1072 (citing *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994); *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *United States v. Johnson*, 457 U.S. 537, 542 n. 8, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982); and *Linkletter v. Walker*, 381 U.S. 618, 622 n. 5, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965)).

Robinson contends that an order denying certiorari is a "qualified" order because Supreme Court Rule 44 allows a petition for rehearing within 25 days of the denial of certiorari. In this sense, he argues, the denial of certiorari is not really complete until the Court denies a petition for rehearing, or the time for filing a petition for rehearing expires. The Supreme Court has not directly addressed the effect of rehearing procedure on the finality of a conviction for purposes of § 2255. But we held in *Horton* that the availability of a petition for rehearing a denial of certiorari has no effect on the finality of a conviction for purposes of § 2255. *Horton*, 24 F.3d at 551. The Supreme Court's

decision in *Clay*, decided after *Horton*, reinforces our decision.

In *Clay*, the Court was asked to decide when finality attaches for purposes of postconviction review in a case where the federal prisoner brought an unsuccessful direct appeal but then failed to petition for certiorari. *Clay*, 537 U.S. at 524, 123 S.Ct. 1072. Rather than accept the government's argument that finality attached when the appellate court issued its mandate in the direct appeal, the Court followed what it characterized as its "consistent understanding of finality in the context of collateral review" and held that finality attached when the time for filing a certiorari petition expired. *Id.* The Court held that in the postconviction context, "finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Id.* at 527, 123 S.Ct. 1072. Just last month, in a case involving another of the statutory triggers to § 2255's one-year limitations period, the Supreme Court reiterated *Clay*'s statement of the finality rule in the postconviction context. See *Dodd v. United States*, ___ U.S. ___, 125 S.Ct. 2478, 2480, ___ L.Ed.2d ___ (2005).

Robinson points to a minor variation in the Supreme Court's iteration of the finality rule in an effort to cast doubt on its operation. He argues that although the Court has held that finality attaches when certiorari has been denied, it has occasionally said a conviction becomes final "when certiorari has been *finally* denied," *Caspari*, 510 U.S. at 390, 114 S.Ct. 948; *Griffith*, 479 U.S. at 321 n. 6, 107 S.Ct. 708, implying that there is a difference between denial and "final denial" of certiorari. But there is no

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difference. Unlike procedure in the appellate court, where the timely filing of a petition for panel rehearing automatically stays the court's mandate, see Fed. R. App. P. 41(d)(1), under Supreme Court Rule 16.3 the filing of a petition for rehearing a denial of certiorari has no effect, absent a specific order of the Court or a Justice thereof:

Whenever the Court denies a petition for writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. *The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.*

Sup. Ct. R. 16.3 (emphasis added).

We noted this distinction in *Horton* and concluded that the opportunity to petition for rehearing of a denial of certiorari has no impact on the finality of convictions for purposes of the one-year limitations period under § 2255. *Horton*, 244 F.3d at 551. There, certiorari was denied and petitioner Horton did not seek rehearing. One year and two days after the denial of certiorari he filed a habeas petition in district court. The district court noted the untimeliness issue but reached the merits anyway and denied relief on substantive grounds. *Id.* at 549. On appeal the government urged affirmance on the alternate ground of untimeliness; Horton responded that the one-year limitations period under § 2255, ¶ 6(1) did not begin to run until 25 days after certiorari was denied, taking into consideration the time allowed by Supreme Court rule for a petition for rehearing. *Id.* at 550; see Sup. Ct. R. 44.2 (providing that a petition for rehearing of an order

denying certiorari shall be filed within 25 days after the date of the order of denial).

We rejected Horton's argument, holding that because Supreme Court Rule 16.3 makes the denial of certiorari effective upon entry on the Court's docket, the filing of a petition for rehearing has no effect on the finality of the conviction. *Horton*, 244 F.3d at 550. Once certiorari is denied, no federal court needs to take any further action to dispose of the case. *Id.* at 550-51. The conviction is therefore final for purposes of postconviction relief, and the clock starts to run on the one-year limitations period in § 2255, "irrespective of the opportunity to petition the Supreme Court for rehearing." *Id.* at 551.

Robinson acknowledges *Horton* but asks us to revisit the holding of that case in light of language in *Simpson & Co. v. Commissioner of Internal Revenue*, 321 U.S. 225, 64 S.Ct. 496, 88 L.Ed. 688 (1944) and *Flynn v. United States*, 75 S.Ct. 285, 99 L.Ed. 1298 (1955). In *Simpson*, the Supreme Court was asked to decide whether it could entertain an out-of-time petition for rehearing a denial of certiorari in light of a provision in the Internal Revenue Code deeming the decisions of the Board of Tax Appeals (predecessor to the Tax Court) final upon denial of a petition for certiorari or expiration of 30 days from issuance of the Supreme Court's mandate. *Simpson*, 321 U.S. at 227, 64 S.Ct. 496. The Court held that the tax statute by its terms prevented the Court from hearing the petitioner's claim. *Id.* at 230, 64 S.Ct. 496. Robinson points to the following language in *Simpson*:

No mandate issues on denial of certiorari, and after a final decision the mandate does not issue until expiration of the 25-day period within which petition for rehearing may be filed. If,

therefore, we follow the practice heretofore observed, by which we regard denials of certiorari as qualified until the 25-day period expires, we put the denial and the decision on a generally equal basis except as Congress has seen fit to give the latter an additional thirty days before finality.

Id. at 229-30, 64 S.Ct. 496. Robinson contends that *Simpson's* characterization of denials of certiorari as "qualified" should, in turn, qualify *Clay's* holding that finality for postconviction purposes attaches when certiorari is denied. Thus, Robinson argues, a "final" denial of certiorari occurs only after the period for rehearing has elapsed or, if rehearing is requested, when it is denied.

To read *Simpson* as a limitation on *Clay* would require us to ignore the Court's current rules and its unequivocal pronouncement on the issue of finality in the postconviction context in *Clay* itself. The Supreme Court's rules have changed since *Simpson*. Former Rule 34, the predecessor to Rule 16.3, was silent on whether an order denying certiorari was suspended pending disposition of a rehearing petition; as noted above, however, current Rule 16.3 specifically provides that "[t]he order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice." Thus, under the current rules, "the denial of certiorari is effective when issued and it disposes of the case before the Supreme Court." *Horton*, 244 F.3d at 551 (citing Sup. Ct. R. 16.3; *Marcello*, 212 F.3d at 1008). Furthermore, the court was straightforward in its 2003 holding in *Clay*: "Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition

expires." *Clay*, 537 U.S. at 527, 123 S.Ct. 1072. The Court could have added the 25-day rehearing window to this formulation, but did not.

Robinson also extrapolates certain language in *Flynn*, 75 S.Ct. at 286, to support his argument that denials of certiorari are "qualified" in nature. *Flynn* is a 1955 in-chambers opinion issued by Justice Frankfurter withholding the Court's order of denial of certiorari in a criminal case. Justice Frankfurter granted the defendants' request pursuant to then-Rule 25 of the Supreme Court, which authorized a Justice to direct the Clerk to withhold notification of the denial of certiorari. Along the way to granting the defendants' request, Justice Frankfurter offered the following general comment on the availability of rehearing:

The right to [rehearing] is not to be deemed an empty formality as though such petitions will as a matter of course be denied. This being so, the denial of a petition for certiorari should not be treated as a definitive determination in this Court, subject to all the consequences of such an interpretation.

Id. at 286.

This passage does not assist Robinson. The *Flynn* defendants were at the Supreme Court requesting a withholding of the Court's notification of the denial of certiorari in order to prevent the revocation of their bail, which was to occur automatically, pursuant to the district court's order, upon affirmance of their convictions by the Court of Appeals. Justice Frankfurter withheld the order for five days, long enough for the defendants to file their motion for rehearing of the denial of certiorari. He

engaged in no consideration of whether a denial of certiorari is "definitive" for purposes of conferring finality in the postconviction context; the opinion therefore cannot be read as having a substantive effect on the question of finality under § 2255, ¶ 6(1), particularly in light of the current text of Rule 16.3.

Our holding in *Horton* is consistent with that of every other circuit court that has considered this issue. *United States v. Segers*, 271 F.3d 181, 184 (4th Cir.2001) (absent the issuance of a suspension order by the Court or a Justice thereof, the conviction of a prisoner who has petitioned for certiorari becomes final for purposes of the one-year period of limitations under § 2255, ¶ 6(1) when the Court denies certiorari, rejecting prisoner's argument that period begins only upon expiration of 25-day period for rehearing); *United States v. Thomas*, 203 F.3d 350, 356 (5th Cir.2000) (same); *United States v. Willis*, 202 F.3d 1279, 1280-81 (10th Cir.2000) (same); see also *Campa-Fabela v. United States*, 339 F.3d 993, 994 (8th Cir.2003) (finding persuasive the reasoning of the courts that have specifically addressed the rehearing petition issue in the AEDPA context, relying on Supreme Court Rule 16.3). We perceive no compelling reason to overrule *Horton* and create a split among the circuits on this quite basic and recurring issue.

Applying *Horton*, Robinson's petition for rehearing the denial of his certiorari petition had no effect on the finality of his conviction. Pursuant to *Clay*, *Horton*, and *Marcello*, Robinson's conviction became final for purposes of § 2255, ¶ 6(1) on October 1, 2001, when the Supreme Court denied his petition for certiorari. Robinson filed his § 2255 motion for postconviction relief on March 14, 2003, more than one

year after his conviction became final.¹ The district court properly denied it as untimely.

AFFIRMED.

¹ Robinson makes a cursory fallback argument that the limitations period should be equitably tolled because he justifiably relied on the denial of his rehearing petition as the date on which his conviction became final. This argument is foreclosed by *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.2000). Equitable tolling is granted sparingly, where extraordinary circumstances beyond the litigant's control prevented timely filing; a mistaken understanding about the deadline for filing is not grounds for equitable tolling. *Id.*

288 F.Supp.2d 927

United States District Court, C.D. Illinois.
Charles ROBINSON, Petitioner,

v.

UNITED STATES of America, Respondent.
No. 03-3059.

Oct. 27, 2003.

Charles Robinson (pro se), Greenville Federal Correctional Institution, Greenville, IL, for Petitioner.

Gregory M. Gilmore, Springfield, IL, for Respondent.

OPINION

RICHARD MILLS, District Judge.

The Court now considers Charles Robinson's 28 U.S.C. § 2255 Petition for Writ of Habeas Corpus.

FACTS

On December 4, 1997, a jury convicted Charles Robinson of possession of cocaine and cocaine base with intent to distribute and simple possession of cocaine base. The Court sentenced Robinson on June 2, 1998. Robinson timely appealed. The Seventh Circuit affirmed Robinson's convictions, but vacated his sentence and remanded. *See United States v. Robinson*, 164 F.3d 1068 (7th Cir.1999).

On remand, Robinson received a sentence of 100 years in prison. *See United States v. Robinson*, 76 F.Supp.2d 941 (C.D.Ill.1999). Again, Robinson appealed. The Seventh Circuit affirmed in *United States v. Robinson IV*, 215 F.3d 1331, 2000 WL 689182 (7th Cir.2000). However, the Supreme Court vacated the Seventh Circuit's judgment

and remanded "for further consideration in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)". See *Robinson v. United States*, 531 U.S. 1005, 121 S.Ct. 559, 148 L.Ed.2d 479 (2000). The Seventh Circuit reviewed Robinson's *Apprendi* claim and held that he was not entitled to new sentencing hearing given the overwhelming evidence establishing drug quantities supporting enhanced sentences. See *United States v. Robinson*, 250 F.3d 527 (7th Cir.2001).

Robinson sought certiorari, but the Supreme Court denied his motion on October 1, 2001. See *Robinson v. United States*, 534 U.S. 895, 122 S.Ct. 215, 151 L.Ed.2d 153 (2001). Robinson moved for rehearing on his motion. The Supreme Court denied rehearing on March 18, 2002. See *Robinson v. United States*, 535 U.S. 952, 122 S.Ct. 1354, 152 L.Ed.2d 256 (2002).

Robinson filed the instant habeas petition on March 14, 2003. The Court denies Robinson's petition because it is untimely.

ANALYSIS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposed a "1 year period of limitation" on petitions, triggered by one of four events, including "the date on which the judgment of conviction becomes final." See 28 U.S.C. § 2255. The AEDPA does not define "final" or specify how the 1 year period should be computed. However, "[f]or defendants who try unsuccessfully to take their case to the Supreme Court, their judgments of conviction become final on the date their petitions for certiorari are denied." See *United States v. Marcello*, 212 F.3d 1005, 1008 (7th Cir.2000) (citations omitted).

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The Supreme Court denied Robinson's petition for certiorari on October 1, 2001. Thus, October 1, 2001, was the date his judgment of conviction became final. Robinson had one year from that date to file a habeas petition. See 28 U.S.C. § 2255; *Marcello*, 212 F.3d at 1008. Because Robinson did not file his habeas petition until March 14, 2003, the petition must be denied as untimely.

Ergo, Robinson's Petition for Writ of Habeas Corpus is DENIED. This case is CLOSED.

IT IS SO ORDERED.

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AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

CHARLES ROBINSON,

Petitioner,

vs.

Case Number: 03-3059

UNITED STATES OF AMERICA,

Respondent.

(Filed Oct. 27, 2003)

☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX DECISION BY THE COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to an Opinion entered October 27, 2003 by U.S. District Judge Richard Mills that the Petitioner's Petition for Writ of Habeas Corpus is denied as untimely. This case is closed.

ENTER this 27th day of October, 2003.

/s/ John M. Waters

JOHN M. WATERS, CLERK

/s/ A. Foos
BY: DEPUTY CLERK

(5)
No. 05-832

ja

In The
Supreme Court of the United States

— * —
CHARLES R. ROBINSON, IV,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

— * —
On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

— * —
PETITION FOR REHEARING

— * —
Charles R. Robinson, IV
Pro'se Litigant
I.D. #11087-026
Federal Correctional
Institution
P.O. Box 5000
Greenville, IL., 62246

i.

QUESTIONS PRESENTED

Whether a District Court may sua sponte dismiss an untimely petition where the Government has failed to raise a limitations defense.

whether rehearings in the United States Supreme Court are to be deemed empty formalities if the final action that this Court takes is the denial of a writ of certiorari.

whether pro'se litigants are to be held to the same standards as attorneys.

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STATEMENT OF JURISDICTION

This Court denied Petitioner's petition for writ of certiorari on Feb. 21, 2006.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and S.Ct. Rule 44 (2) regarding rehearings.

STATEMENT OF THE CASE

On March 14, 2003, Robinson filed with the District Court his Motion under Section 2255. The District Court had jurisdiction over Robinson's Motion pursuant to 28 U.S.C. § 1331. On October 27, 2003, the District Court denied Robinson's Motion, without a response from the Government, concluding that it was untimely and filed outside the one-year statute of limitations period set forth in Section 2255. The District Court raised the question of the timeliness of Robinson's Motion *sua sponte* and held that Robinson's conviction became final under Section 2255 on the date that this Court initially denied Robinson's petition for a writ of certiorari, October 1, 2001; (the "Initial Certiorari Denial"), even though Robinson filed a petition for rehearing that this Court did not deny until March 18, 2002 (the "Rehearing Denial"). The District Court determined that the filing of the petition for rehearing did not toll the finality of the conviction. Therefore, even though Robinson filed his Motion within one year of the Rehearing Denial, the District Court found it untimely because it was filed more than one year after the Initial Certiorari Denial and

entered judgment confirming Robinson's conviction and sentence. The District Court did not reach the merits of Robinson's Motion.

Robinson noticed his appeal to the Seventh Circuit and moved for a certificate of appealability. The District Court denied Robinson's motion for a certificate of appealability. He then moved the Seventh Circuit for a certificate of appealability, which the Seventh Circuit granted. The Seventh Circuit granted the certificate on the timeliness issue as well as an ineffective assistance of counsel issue. However, the Seventh Circuit did not address the ineffective claim because it never got passed the timeliness issue.

On appeal to the Seventh Circuit, Robinson argued that his Motion was timely filed within Section 2255's one year statute limitations because he file it within one year of this Court's Rehearing Denial. The Seventh Circuit rejected Robinson's argument, affirming the District Court's dismissal of the Motion as untimely in a decision dated July 29, 2005.

The Seventh Circuit noted that Section 2255 does not define finality. It further noted that this Court had not directly addressed the effect of a rehearing procedure on the finality of a conviction for purposes of Section 2255. However, the Seventh Circuit looked to Clay v. United States, 537 U.S. 522 (2003), which did not involve a rehearing petition, and Supreme Court Rule 16.3, which is a non-substantive notification rule, to conclude, in error, that Robinson's convictions was "final" for purposes of Section 2255's one-year statute of limitation

when this Court initially denied his petition for certiorari on direct review, even though Robinson had timely filed a petition for rehearing of that denial. This conclusion is consistent with decisions of this Court, which hold that the denial of a petition for certiorari is qualified until the time for petitioning for rehearing expires. See R. Simpson & Co. v. Comm'r of Internal Revenue, 321 U.S. 255 (1944); Flynn v. United States, 75 S.Ct. 285 (1955). As other circuits have found, the logic of these decisions is that, once a petition for rehearing a denial of certiorari is filed, the initial denial of certiorari remains qualified until this Court has disposed of the petition for rehearing, which then becomes the final action of this Court. Thus, a petition for certiorari is not finally denied until the Court resolves any outstanding petition for rehearing. The Seventh Circuit's decision conflicts with this binding Supreme Court precedent insofar as it concluded that Robinson's conviction was final when this Court initially denied certiorari on direct review despite Robinson's timely-filed petition for rehearing.

Robinson now petitions this Court for rehearing.

*
REASONS FOR GRANTING REHEARING

- I. The District Court's Sua Sponte Dismissal Of Robinson's § 2255 Petition For Timeliness, When The Government Did Not Raise The Timeliness Issue, Was Error.

The District Court, sua sponte, dismissed Robinson's

Section 2255 motion on the grounds that it was not timely. The sua sponte dismissals of 2255 petitions, by the District Courts, is an issue that this Supreme Court of the United States has agreed to address. (Day v. Crosby, U.S., No. 04-1324. Eleventh Circuit.) Petitioner ask this Court to hold this motion in abeyance until it decides Day v. Crosby.

The AEDPA's statute of limitations is an affirmative defense, not a jurisdictional defect, which is more appropriately asserted by the Respondent, as required by Rule 12(b), Fed. R. Civ. Proc. rather than by the Court. The District Court, in asserting, sua sponte, an affirmative defense, assumes a burden that is best left to the parties in the case. Indeed, for whatever reason, the Government might choose to waive the affirmative defense the Court asserted here. It would be better to have ordered the Government to respond to Robinson's motion, rather than dismissing the case on statute of limitations grounds. Instead of the neutral and detached role our system of justice assigns to judges, the assertion of an affirmative defense on behalf of one of the parties, abandons the time-honored rule of neutrality, and casts the court in the role of a partisan.

There is a split in the Circuits concerning this issue, thus the reason for this Court granting cert. in Day v. Crosby. Although it is not controlling, the Supreme Court of Illinois has grappled with the same issue under the Illinois Post-conviction Hearing Act. The Supreme Court of Illinois has precluded its trial judges from ruling a timeliness issue sua

sponte. People v. Wright 189 Ill.2d 1, 723 N.E.2d 230 (1999); People v. Bocclair, 202 Ill.2d 89 (2002). While these Illinois Supreme Court cases involved the Illinois Post-Conviction Hearing Act, the specific issue the Illinois Supreme Court discussed is relevant here. The Illinois Post-Conviction hearing Act imposes a three-year statute of limitations. Prior to the Illinois Supreme Court's holding in Wright, it was common for Circuit Judges to dismiss Post-Conviction petitions that were untimely. But in Wright, the Supreme Court held this practice to be inappropriate because the time-limit imposed by the statute was not jurisdictional, but was an affirmative defense which had to be raised by the State's Attorney who, the Supreme Court noted, was free to waive the defense, in the same manner as any other affirmative defense may be waived by not pleading it.

Rule 4 of the rules governing § 2255 proceedings provides as follows:

(b) **Initial consideration by judge.** The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period to time fixed by the court or to take such other action as the judge deems appropriate.

Rule 4 reiterates much of what § 2255 itself says. The

relevant portion of 28 U.S.C. § 2255 provides:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2255 ¶2.

Clearly, these provisions have to do with the question of whether the merits of the § 2255 petition warrant further consideration, a conclusion buttressed by the history of § 2255. The one-year statute of limitation did not become a part of § 2255 until April 23, 1996. Rule 4 of the Rules Governing Section 2255 proceedings for the United States District Courts was promulgated in 1977, nearly 20 years before the passage of the amendments of § 2255, which were embodied in the Anti-Terrorist and Effective Death Penalty Act of 1996, which, as noted, became effective on April 23, 1996.

Consequently, it was error for the District Court to summarily dismiss Robinson's § 2255 motion on a statute of limitations ground without considering the merits of Robinson's claims.

II. Rehearing in the Supreme Court are not to be deemed empty formalities.

Congress did not define when a conviction becomes "final" in the context of a § 2255 proceeding. But Congress is presumed to be familiar with the construction of the word "final" in a post-conviction context. In United States v. Clay, 155 L.Ed.2d 88 (2003), the Court held that a conviction becomes "final"

"when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when time for filing a certiorari petition expires." However, no petition for rehearing had been filed in Clay, so the Court had no reason to consider, and did not consider the effect such a petition would have in its definition of finality. By contrast, here, where Robinson did file a petition for rehearing, the question becomes whether or not a petition for rehearing is a empty formality.

It is ironic that this petition, petition for rehearing, is concerning a petition for rehearing. A petition for rehearing is the final action that a defendant may take. Final judgement is the final action that this Court may take concerning a particular defendant. Black's Law Dictionary defines "final judgment" as the court's last action that settles the rights of the parties and disposes of all issues in controversy. Thus, rehearings are not to be deemed empty formalities.

The view of the Supreme Court that a conviction is not final until the Supreme Court has denied a petition for rehearing, where, as here, a timely filed petition for rehearing was submitted for the Supreme Court's consideration, is premised upon the fact that where there exists the possibility the conviction could be overturned as a result of some pending action, the conviction is not "final" within the meaning of the term as used in 28 U.S.C. § 2255 §6.

Rehearings are not empty formalities. Although rehearing

in the Supreme Court is not a matter of right, the right to petition for rehearing within 25 days of the denial of the petition for writ of certiorari is a matter of right. R. Simpson and Co. v. Comm'r of Internal Revenue, 88 L.Ed 688 (1944) ("Our rules provide for petitions for rehearing as a matter of right within 25 days after judgment, and this rule has been applied to petitions for rehearings of orders denying certiorari.") In fact, the Supreme Court deems "denials of certiorari as qualified until the 25-day period expires. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, Supreme Court Practice. Sec/ 15.4 (8th ed. 2002) ("The Supreme Court's denial of certiorari is 'qualified' and not final until the expiration of the period in which a petition for rehearing is allowed.")

It is inappropriate to apply Rule 16.3 because it is only a notification Rule, the purpose of which is to alert counsel that the 25-day period for petitioning for rehearing under Rule 44.2 has commenced See Hanover Ins. Co. v. United States, 880 F.2d 1503, 1508 (1st Cir. 1989). To view it any differently would be contrary to this Court's holding in Flynn v. United States, 99 L.Ed 1288 (1955). Justice Frankfurter explained:

A petition for rehearing of a denial of a petition for a writ of certiorari is part of the appellate procedure authorized by the Rules of this Court...The right to such a consideration is not to be deemed an **empty formality** as though such petitions will as a matter of course be denied. This being so, the denial of a petition for certiorari should not be treated as a definitive determination in this Court subject to all the consequences of such an interpretation.

When a petitioner exercises his right to seek rehearing, the practice heretofore observed by this Court is to deem the decision denying certiorari non-final until the decision on the petition for rehearing. Simpson, supra. As an illustration of now non-final the decision may be, in Florida v. Rodriguez, 83 L.Ed.2d 165 (1984), this Court denied certiorari sought by the Florida Attorney General in 1981, yet granted review in 1983, on the timely-filed petition for rehearing. Florida v. Rodriguez, 469 U.S. 1, 11. Final disposition of the appeal occurred four years after the Supreme Court's denial of certiorari.

It is interesting to note that the Court denied certiorari on May 26, 1981. Florida v. Rodriguez, 69 L.Ed.2d 395 (1981). Thereafter, the Attorney General of Florida filed a timely petition for rehearing. The petition remained on the Court's docket for the next two years. On May 23, 1983, the Court entered an order granting the petition for rehearing, reversing the judgment of the Florida Court of Appeals, and remanding the case back to the Florida Court of Appeal for consideration in light of the Supreme Court's opinion in Florida v. Royer, 75 L.Ed2d 229 (1983). It is clear that the petition for rehearing was an integral part of the appellate process, and clearly demonstrates what Justice Frankfurter was saying in Flynn, which is, petitions for rehearing "are not to be deemed empty formalities."

The United States Court of Appeals for the Eight Circuit, in the case of Blair v. Armontrout, 994 F.2d 532 (8th Cir.

1993), discussed the question of whether a petition for rehearing following the denial of a petition for certiorari meant that the decision of the Supreme Court was not final until the timely-filed petition for rehearing was disposed of. held:

There is little law to guide us. The reasoning in a tax case from the First Circuit is, however, instructive. In that case, the First Circuit held that a tax court decision that was appealed through the federal courts did not become final until the expiration of the rehearing process in the Supreme Court. Hanover Ins. Co. v. United States, 880 F.2d 1503, 1509 (1st Cir. 1989), cert. denied, 107 L.Ed.2d 745 (1990). The case dealt with a statute that provided that tax court decisions become final only "[u]pon the Supreme Court's denial of a petition for certiorari. . . ." 26 U.S.C. §7481(a)(2)(B). The First Circuit interpreted "denial" to be that time when the decision became unalterable, or the expiration of the time for rehearing. Id. at 1508-09. In so ruling, the First Circuit relied on a Supreme Court order in Flynn v. United States, 99 L.Ed 1298 (1955). Justice Frankfurter explained that if the denial of a petition for a writ of certiorari is deemed final action, the rehearing provisions provided for under the Supreme Court Rules would be an 'empty formality.' Id. 75 S.Ct. at 286. Justice Frankfurter held 'the denial of a petition for certiorari should not be treated as a definitive determination in this Court. . . ." Id. 994 F.2d at 533.

History has borne Justice Frankfurter's view out, as noted by this Court's handling of Florida v. Rodriguez, supra.

III. Pro'se litigants are held to less stringent standards than those of experienced attorneys.

Robinson is not an experienced attorney, nor should he be held to the strict standards of experienced attorneys. To hold otherwise, would be contrary to Supreme Court precedent. The Court held, in Haines v. Kerner, 30 L.Ed.2d 652 (1972) that

pro'se litigants are held to less stringent standards than formal pleadings drafted by lawyers , however inartful they may be.

The District Court denied Robinson's § 2255 motion on the basis that it was untimely. The Government did not raise the timeliness issue. And Robinson was never given an opportunity, he was entitled, to supplement his pleadings with a reason for his tardiness.

By sua sponte dismissing Robinson motion, the District Court held Robinson to a standard expected of experienced attorneys. The rules and procedure of federal law are very extensive to say the least. There are many experienced attorneys that are not familiar with all the rules and procedures. To expect a defendant to be abreast of all the rules and procedures is at odds with this Court's precedent.

A large majority of defendants do not have a high school education upon entering the system. And once in the system, the standard for earning a G.E.D. is bottom-basement-low. Attorneys attend college for many years before they are certified to practice law. The divide between a jail-house G.E.D. and a law degree, is extensive

Most of defendants know that they have one year from the date their conviction becomes final in which to submit a § 2255 motion attacking their sentence or conviction. The average college graduate would define the word "final" to mean that there is nothing left, the end of the road, the ultimate decision ect. In the context of a criminal proceeding, the

average lay-person would think of "final" to mean that there is no further action the Court can take.

Robinson submitted his § 2255 motion within one year after this Court denied his timely motion for rehearing, which is the last action that this Court takes on any proceeding. The District Court, in sua sponte dismissing Robinson's motion, is saying that Robinson should have known that his motion was due one year from the date this Court denied cert., which is an unreasonable burden to place on an inexperienced defendant. Experienced attorneys are at odds about when the starting date begins to run; so one cannot expect a defendant to have the answer to that which attorneys don't have the definite answer.

Robinson was sentenced to a whopping 100-year sentence for the mere possession with intent to deliver 32 grams of cocaine base. A sentence of this magnitude for such a little amount of drugs is unheard of in the history of this Court, or any other court for that matter. Robinson's only chance of lowering this sentence was by way of § 2255 motion. But the same judge who sentenced Robinson to the 100-year sentence, dismissed his motion sua sponte without reaching the merits of his motion. Robinson was not even afforded the opportunity to plead as to why his motion was late. Holding Robinson to such a standard is unreasonable.

CONCLUSION

This Court is the last recourse that Robinson has of attacking a sentence that is, without question, the most unusual

sentence ever given to a defendant for such a small amount of drugs. Murderers, child molesters, gang related crimes, rapist, and even terrorist are not sentenced as severely as Robinson. Sentences of 100 years are reserved for big-time drug offenders, not bottom level addicts supporting their habit. To administer a sentence of 100 years for the conviction of 32 grams of cocaine base, and denying him the opportunity for collateral attack, is unconscionable. Petitioner ask this Honorable Court to allow him his day in court; for the opportunity to be heard. He ask this Court to summarily remand this case back to the District Court in order for his \$ 2255 motion to be heard on the merits.

Respectfully submitted

Charles R. Robinson, IV
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P.O. Box 5000
Greenville, Ill. 62246

CERTIFICATE OF SERVICE/DECLARATION

In accordance with 28 U.S.C. § 1746, the undersigned swears under the penalty of perjury the contents of the foregoing motion is in compliance with S.Ct. Rule 44(2). And that the foregoing motion for rehearing is not for delay purposes, but is presented in good faith.

The undersigned also certifies that he did mail a full and correct copy of the foregoing:

PETITION FOR REHEARING

to:

The United States Supreme Court
U.S. Supreme Court Bldg.
One First Street N.E.
Washington, DC 20543

by first class mail, in an envelope addressed as aforesaid, with sufficient first-class postage prepaid and affixed thereto, and by depositing the same in the mail receptacle provided for inmate use in mailing legal materials from the Federal Correctional Institution at Greenville, Illinois, on this 9th day of March, 2003.

Charles R. Robinson IV
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